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NO. 88906-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BYRON EUGENE SCHERF,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

Honorable Thomas J. Wynne and Honorable George F.B. Appel, Judges

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BRIEF OF APPELLANT ON COMMISSIONER'S REPORT  
AND FINDINGS REGARDING THE BECKETT REPORT

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**A. SCHERF HAS USED THE BECKETT REPORT AS SUPPORT FOR HIS CHALLENGES TO THE WASHINGTON DEATH PENALTY STATUTE.**

Appellant Byron Scherf, in his briefing in this Court and at oral argument, has cited the Beckett Report<sup>1</sup> to support his arguments: (1) that prosecutors' decisions on whether to seek the death penalty have little to do with the sufficiency of the mitigation evidence, considered in light of the crime, as required by RCW 10.95.040 and .060; and (2) that prosecutors' decisions to seek the death penalty and juries' imposition of a death sentence are arbitrary because these decisions are based, in large measure, on factors other than valid case characteristics. These arguments are made in addition to the argument (3) that the death penalty is flawed because of geographic arbitrariness and racial bias in its application.

More specifically, Mr. Scherf has argued to this court:

1. **The decision to seek the death penalty has little to do with the actual characteristics of the case.**

The Beckett Report found that case characteristics (e.g. prior convictions, number of aggravators and victims, prolonged suffering,

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<sup>1</sup> Katherine Beckett and Heather Evans, The Role of Race in Washington Capital Sentencing, 1981-2014 (updated report).

hostage-taking<sup>2</sup>) explain less than 10% of the variation in prosecutors' decisions to seek the death penalty; and that, for one example, prosecutors are three times more likely to seek death in cases involving extensive publicity – a factor unrelated to aggravating or mitigating circumstances. While not exhaustive on the reasons prosecutors file notices, the Beckett Report's findings show that a prosecutor's reasons for seeking death may include reasons that have very little or nothing to do with the characteristics related to aggravated murder cases<sup>3</sup> or the amount or quality of mitigation as required by RCW 10.95.040, and 10.95.060, which provide that "the prosecuting attorney shall file a notice of a special sentencing proceeding . . . when [having in mind the crime of conviction] there is reason to believe that that are not sufficient mitigating circumstances to merit leniency." Statutory mitigation includes criminal history and other factors about the defendant. RCW 10.95.070.

If a prosecutor's decision to seek the death penalty is not driven by the relevant characteristics of the case, then it is driven by other factors,

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<sup>2</sup> Characteristics included in the trial reports filed by trial judges in every aggravated murder case, whether or not a death sentence is sought or imposed, and considered by this Court in performing proportionality review. See, e.g., State v. Davis, 165 Wn.2d 287, 348, 290 P.3d 43 (2012) (aggravating circumstances, criminal history, facts about the crime and defendant).

<sup>3</sup> As set out in the trial reports and considered by this Court on mandatory review.

such as the amount of publicity the case has received. If it is driven by other, non-case-related factors then there is no guarantee that it won't be arbitrarily imposed, without regard to objective and consistent standards. If it is arbitrarily imposed, it is unconstitutional. Gregg v. Georgia, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1974) (opinion of Stewart, Powell and Stevens, JJ) ("where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

**2. Decisions to seek and decisions to impose a death sentence are arbitrary because they are not associated with valid case characteristics.**

To be constitutional, decisions to seek and impose a death sentence must both take into account the uniqueness of the individual and be fairly, not arbitrarily, imposed: "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) (emphasis added) ; State v. Cross, 156 Wn.2d 580, 624, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006). The constitution requires "a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." Eddings, 455 U.S. at 110.

The findings of the Beckett Report showing that the characteristics of a case explain very little of the variation in decisions to seek or impose a death sentence demonstrate the absence of consistent and fair principles guiding the imposition of the death penalty in Washington. Report at 15 (the “large proportion of remaining unexplained variation . . . suggests that other extra-legal and social factors – not captured by our statistical models – are likely playing important roles in death penalty case dynamics”). The absence of consistent, objective and fair principles constraining the decision and imposition of the death penalty makes the sentencing scheme unconstitutional under state and federal authority.

These findings of the Beckett Report demonstrate further that proportionality review has failed as a mechanism for overcoming, after the fact, the arbitrariness of the decisions by the prosecutor and jury in capital cases. In State v. Davis, 175 Wn.2d 287, 386, 397, 290 P.3d 43 (2012), for a prime example, a majority of this Court rejected the dissent’s conclusion that, in light of the trial reports, the death penalty is arbitrarily imposed without any principled way to distinguish those who received the death penalty from those who did not. The Davis majority did so by finding that the differences in results of objectively similar cases meant that the jurors were making individualized determinations Davis, at 355. This explanation overlooks the requirement of both

consistency and individualized capital sentencing. Decisions are not consistent and are arbitrary where a defendant charged with aggravated murder may not be in a county that does not file death notices in any cases<sup>4</sup> or where a defendant might not have a victim's family who do not wish the state to seek death or be able to provide the state with information on other homicides he has committed. A defendant may not have any of the extra-legal or social factors which resulted in not filing the death sentence in another case with objectively comparable or more reprehensible characteristics. Thus, even though a decision not to file a notice in one case may be explained or rationalized on factors unique to that case, those factors do not save the decision from being arbitrary when considered along with other cases for proportionality.

What the Beckett Report supports is the conclusion that decisions to seek or impose the death penalty have little to do with the characteristics of the cases, which represent objective factors – the absence or presence of which are relevant in all aggravated murders. It supports the conclusion that the Washington death penalty statute fails to be fairly and consistently applied. In the absence of any substantial

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<sup>4</sup> “The figures above provide evidence that the likelihood that prosecutors will seek and juries will impose death for a given defendant in an aggravated murder case depends in part on the place in which the case is adjudicated.” Report, p.8.



correlation between valid objective characteristics and sentences, any presumption that such a correlation exists and proves the system is working is unwarranted.

**3. The Report shows that the death penalty statute is unconstitutionally flawed because of racial bias.**

The death penalty may not constitutionally be applied based on race. Furman v. Georgia, 408 U.S. 238, 309-310, 255, 92 S. Ct. 2726, 333 L. Ed. 2d 346 (1972) (Stewart, J. and White, J., concurring).

**B. THE BECKETT REPORT, AFTER BEING SUBJECTED TO A RIGOROUS REVIEW AND CHALLENGE, CONTINUES TO SUPPORTS SCHERF'S ARGUMENTS.**

The Beckett Report was filed by counsel for Allen Gregory in his case, No. 88086-7, in support of his arguments that the death penalty in Washington is implemented in a racially and geographically biased manner, in violation of the state and federal constitutions. Mr. Scherf cited the Beckett Report in support of arguments he is making – as outlined above – in his capital case.<sup>5</sup> At oral argument in Gregory, the state requested the opportunity to challenge the Beckett Report; this Court granted the state's motion and ordered a hearing before Supreme Court Commissioner Narda Pierce. See Findings and Report Relating to

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<sup>5</sup> Appellant Scherf does not intend to limit any argument set out in his other briefing, briefing too lengthy for summarizing here in all particulars.

Parties's Expert Report (Findings), at 1. The state hired Nicholas Scurich, PhD to challenge the Beckett Report. Dr. Scurich filed his report after reviewing the Beckett findings, coding manual and data file; Professor Beckett and co-author Heather Evans responded. Commissioner Pierce reviewed this information and followed up with two sets of interrogatories to the parties and their experts. Findings at 2-4. On November 21, 2017, Commissioner Pierce filed her Findings and Report with the Court. Finding F concerns the interpretation of R-squared and Pseudo R-squared measures. Commissioner's Findings and Report at 94-97.

As the Commissioner set out, in the updated Beckett Report, an R-squared statistic was used to explain what percentage a particular factor -- such as relevant case characteristics of aggravated murders -- accounted for the variation in the choice of death or life without parole by prosecutors or juries.<sup>6</sup> Conclusions that case characteristics accounted for a specific percentage of the basis for prosecutors' decisions to file a death notice or juries' decisions to impose a death sentence were based on the R-squared analysis. In the course of the review, Drs. Beckett and Evans agreed with the state's expert that Pseudo R-squared rather than R-squared

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<sup>6</sup> The following summary is based on the Commissioner's Findings and Report at 94-97 and Response to Evaluation by Dr. Scurich, Interrogatory 32, at 51-54.

should be used in the type of model testing the authors performed, logistic regression. Rather than an R-squared measure yielding a specific percentage, the Pseudo R-squared measure should be used to determine which variables best predict the outcome using the same data. Drs. Beckett and Evans concluded that even though an exact percentage should not be determined by using R-squared, Pseudo R-squared values could be used and showed that there was a great deal of unexplained variation in the decisions to seek or impose death.

The Pseudo R-squared statistic, the agreed upon proper statistic, establishes that valid case characteristics account for only a fraction of the reasons why prosecutor and juries choose life or death and that there are a large number of unexplained factors influencing their decision.

**1. Pseudo R-squared analysis is valid to compare models predicting the same outcomes using the same dataset.**

In her Findings and Report, Commissioner Pierce discussed the Beckett Report's finding that R-squared analysis<sup>7</sup> showed that case characteristics alone explained only a very small proportion of the variation in the decisions to seek or impose the death penalty. Findings at 95. Commissioner Pierce noted that, in the Response to Evaluation by Dr.

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<sup>7</sup> "R-square" statistic is the percentage of variation in the dependent variable that is accounted for by all the explanatory variables used in the particular model. Reference Guide on Multiple Regression, at 345. The R-square value varies from "0,"explains none, to "1," explains all.

Scurich, Professor Beckett explained that the R-squared analysis should be considered “Pseudo” R- squared because R-squared does not have the same meaning in the logistic regression she performed as it does in ordinary regression analysis – there is no equivalent statistic for logistic regression analysis. Professor Beckett concluded, however, that “[a]lthough Pseudo R-squared statistics cannot be interpreted independently or compared across datasets, they are valid and useful in evaluating multiple models predicting the same outcomes using the same dataset. For this reason. . . we suggest using this statistic only to compare models using the same dataset. In this situation, the higher Pseudo R-squared identifies the model that better predicts the outcome.” Findings at 96-97 (quoting Professor Beckett’s Responses to Commissioner’s Interrogatories to Parties’ Experts, at 51.

Professor Beckett concluded, as Commissioner Pierce quoted in her Findings: “[a]lthough none of the Pseudo R-squared measure can be interpreted as an exact percentage of variation explained, none of these values approaches 1.0, indicating there is much unexplained variation in the decision to impose death.” Id. at 97 (Responses at 54) (emphasis added).

The Response to Commissioner’s Interrogatories to Parties’ Experts, filed by Beckett and Evans on July 12, 2017, included a table

showing Pseudo R-squared values using three models: a “null” model with no predictors, a model with six legally-relevant characteristics, and the same model with legally-relevant characteristics plus the defendant’s race. Resp. at 53. The McKelvey& Zovina measure, the closest to approximating the OLS R-squared values, showed 00 value for the null model, a 0.44 value for the model with relevant case characteristics and an approximately .50 value when the race of the defendant was added. Resp. at 53-54. All measures showed that the model with case characteristics provided a better fit than the null model and that adding the race of the defendant provided an even better fit for explaining the variation in death penalty decisions. Id.

Thus, the Pseudo R-squared analysis showed two things: (1) that adding the race of the defendant improved the value of the case characteristics in explaining the variation in results in imposing a death sentence and (2) that, while not exact percentages, the legally-relevant case characteristics left “much unexplained variation in the decision to impose death.” Resp. at 53.

2. **Pseudo R-squared analysis shows that prosecutors seek and juries impose the death penalty for reasons other than the legally-relevant case characteristics, demonstrating arbitrary application of the statute.**

The Beckett Report, as amended by the answer to Interrogatory 32,

confirms that there are no identifiable, non-arbitrary, or consistent factors which explain the variation in juries' death verdicts. The six case characteristics explain some -- .44. That value increases to .5 when one more characteristic, the race of the defendant, is added. But this leaves "much unexplained."

When this Court, in Davis, sought to explain the "unexplained" difference, it identified, among other things, the strength of the state's case, the views of the victim's parents, unsolved murders about which the defendant could provide information, the fact that one or two jurors could change the results, and the successful efforts of defense counsel. These factors, together with pretrial publicity, geographical disparity and racial bias, confirm that the death penalty is administered in an arbitrary way in Washington. It is not enough that different results might be explainable, and not irrational; it is that the factors which may be determinative of whether a death sentence will be imposed may have little to do with moral culpability and likely are not available to defendants in similar cases in different counties. Proportionality review requires comparability of cases and results, not a statement of why similar cases might receive different results, nor an after-the-fact search for a way to rationalize the difference. A jury considering whether to impose the death penalty must make an individualized determination. But notwithstanding, the death penalty must

not be arbitrarily imposed. Eddings, supra.

**C. CONCLUSION**

Appellant respectfully submits that the Beckett Report – after stringent review and testing -- supports his request that his death sentence should be reversed.

Respectfully submitted,

DATED this 22nd day of January, 2018

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of January, 2018, I caused a true and correct copy of BRIEF OF APPELLANT ON COMMISSIONER'S REPORT AND FINDINGS REGARDING THE BECKETT REPORT to be served on the following via e-mail

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